to the date of the order, but no interest after judgment was applied for in the Amended Originating Summons. However, having considered the provisions of Order 41 Rule 11 read together with Order 20 Rule 6 of the Rules of the Supreme Court, I agree with Mr. Chin Yew Meng that no request for interest need be specifically prayed for in cases of the present nature. (See *Riches* v. *Westminster Bank, Ltd.*[3]). In my view, as the formal order had the approval of Messrs. M. Segaram & Company in March 1969 without any complaint till January 1972, on the balance of probabilities I am satisfied that an oral application must have been made in respect of interest after judgment, and the learned judge must have exercised his discretion in ordering such interest although it was not prayed for in the Summons. As regards the rate of interest, it was agreed in the charge that it should be charged and payable at the rate of nine per centum per annum. As the Court Order dated March 3, 1969 did not clearly specify for what period the interest should be chargeable, I would allow the chargee's application under Order 54A for a declaration that the rate of interest at nine (9) per centum per annum shall prevail till the date of realisation *i.e.* the date of sale. This is based on the decision of the Federal Court in *American International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.*[4] where the contractual rate of interest at 11 per cent per annum was allowed from the date of judgment until the date of sale.

I would therefore dismiss the chargor's application to set aside the formal order dated March 3, 1969 with costs; and allow the chargee's application for a declaration in terms of paragraph (a) of the Originating Summons. As both cases have been jointly heard, I make no order as to costs in respect of the chargee's application.

Order accordingly.

Solicitors: *Allen & Gledhill; Chelva Nayagam & Co.*

MALAYAN THREAD CO. SDN. BHD. v. OYAMA SHIPPING LINE LTD. & ANOR.

[O.C.J. (Raja Azlan Shah J.) December 15, 1972]

[Kuala Lumpur — Civil Suit No. 1336 of 1969]

Contract — Bill of lading — Exemption clauses — Whether breach of fundamental term of contract — Exenoration from liability.

Contract — Bailment — Care to be taken by bailee — Goods delivered to godown of Port Swettenham Authority — Port Authority By-laws, 1965, r. 91(1) — Contracts (Malay States) Ordinance, 1950, s. 104.

This was an action for damages for breach of contract or for conversion. The plaintiffs were the consignees of cotton sewing thread which were shipped on board a ship belonging to the first defendant. All the goods were unloaded at the ship's side but subsequently a case and 15 cartoons were stolen by a person or persons unknown somewhere between the ship's side and/or in shed No. 6. The first defendants would be liable for breach of contract and conversion unless there was some term in the bill of lading protecting them.

The first defendants relied on clauses 2 and 15 of the bill of lading.

Clause 2 provided that "the shipping company shall not be responsible for any consequences arising or resulting from, *inter alia*, loss by robberies, thefts or pilferages, by land or water whether by persons in the employment or service of the company or otherwise. Clause 15 provided that "In any case the company's liability shall cease as soon as the goods leave the ship's deck and/or tackle".

The Port Swettenham Authority, the second defendants, denied all liability and relied on rule 91(1) of the Port Authority By-laws 1965 which reads "The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless such loss, or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants".

Held: (1) the exemption clauses in this case were wide enough to exonerate the first defendant from responsibility for the short delivery of the goods;

(2) as in the present case the loss or short delivery was caused by theft by some person or persons unknown, and the act of such person or persons could not be considered to be the act of the first defendants, there was no fundamental breach of the contract;

(3) the second defendants, as bailees, had exercised due care and diligence in keeping and preserving the goods entrusted to them and they had discharged the onus of showing that the loss of the goods in question was not due solely to their misconduct or negligence.

Cases referred to:-

(1) *Charted Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd.* [1901] A.C. 369.

(2) *Bontex Knitting Works Ltd.* v. *St. John's Garage* [1943] 2 All E.R. 690.

(3) *Alexander* v. *Railway Executive* [1951] 2 All E.R. 442.

(4) *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 2 All E.R. 866.

(5) *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] M.L.J. 200, P.C.

(6) *Ashby* v. *Tolhurst* [1937] 2 All E.R. 837.

(7) *Hollins* v. *J. Davy Ltd.* [1963] 1 All E.R. 371.

(8) *Sharikat Lee Heng Seng Sdn. Bhd.* v. *Port Swettenham Authority* [1971] 2 M.L.J. 27.

(9) *Williams* v. *Carson Syndicate Ltd.* (1919) 35 T.L.R. 478.

(10) *Cheshire* v. *Bailey* [1905] 1 K.B. 237.

CIVIL SUIT.

Low Yong Suan for the plaintiffs.

Joga Singh for first defendants.

J. Puthucheary (*Abdullah Yusof* and *Wong Soon Wah* with him) for the second defendants.

Raja Azlan Shah J.: On September 18, 1968, 25 packages (10 cases 15 cartons) of cotton sewing thread were shipped on board the ship "Nansei Maru" from Kobe, Japan, and were to be delivered at Port Swettenham, the port of discharge. The shipping company, the first defendants, issued a bill of lading dated September 18, 1968 in which they acknowledged that the goods were shipped to the order of the consignee. There was noted on the bill of lading a request: "Notify party — The Malayan Thread Co. Sendirian Berhad, P.O. Box 462, Kuala Lumpur." They are the plaintiffs, the holders of the bill of lading.

On October 10, 1968 the ship *Nansei Maru* arrived at Port Swettenham. The shipowners had agents called East Season Trading Corporation. On the authority

of these agents the goods were discharged from the ship and placed in Shed No. 6 at North Port of the Port Swettenham Authority, the second defendants. This was done, no doubt, under clause 15 of the bill of lading "at the risk and expense" of the shipper, which meaning includes the consignee (see clause 1, definition of "shipper"). The plaintiffs delivered the bill of lading together with other shipping documents to their forwarding agents, Coast Shipping Agency, who forwarded them to the shipping agents. They in turn issued a delivery order on October 12, 1968. Armed with the delivery order, the clerk of the forwarding agents, Mr. Goh Kim Leng (PW4) went to shed No. 6 the following day to locate the goods. He found 9 cases and 10 cartons. As it was a Sunday, no delivery could be made. He went again the next day (October 14, 1968) but this time he found only 9 cases. He took delivery of 9 cases. On October 16, 1968 he issued a tracer letter to the second defendants notifying short delivery of 1 case and 15 cartons.

The plaintiffs brought this action against both the defendants claiming damages for breach of contract or for conversion. The amount claimed was for $10,891.56 being the value of the goods short delivered.

It is perfectly clear law that the shipping company, the first defendants, are obliged under the contract to deliver the goods described in the bill of lading to the order of the plaintiffs. In this case there was proper delivery but the goods were short delivered. I am satisfied that all the goods *i.e.*, 10 cases and 15 cartons of cotton sewing thread were unloaded at the ship's side but that 1 case and 15 cartons were stolen by person or persons unknown sometime, somewhere between the ship's side and or in shed No. 6. The first defendants are therefore liable for breach of contract and conversion unless there is some term in the bill of lading protecting them. In order to escape the consequences of the short delivery the first defendants say that they are protected by clauses 2 and 15 of the bill of lading. Clause 2 days that the shipping company shall not be responsible for any consequences arising or resulting from: (*inter alia*) loss by robberies, thefts or pilferages, by land or water, whether by persons in the employment or service of the company or otherwise.

In my view the correct approach in the present case is to consider whether on a proper construction of the exemption clauses, the act which caused the short delivery is covered by them. If so, then to consider whether such act is itself a breach of a fundamental term of the contract because no court can allow such a breach to pass unnoticed under the cloak of an exemption clause.

The exemption clauses, on the face of it, could hardly be more comprehensive. In my view, they are wide enough to exonerate the first defendants from responsibility for the act of which the plaintiffs complain, that is, the short delivery of 1 case and 15 cartons of cotton sewing thread. In essence the goods were "stolen" and the loss or short delivery was caused by "theft". Looked at from that angle, then, as a matter of construction, loss or short delivery is *prima facie* clearly within exemption clause 2. I would add that, if a businessman in the position of the plaintiffs had addressed his mind in reading clause 2, theft is one of the forms of loss or short delivery contemplated by it. That is one of the risks which, on the true construction of the clause, the plaintiffs take. And it is no less *prima facie* within clause 15:

"In any case the company's liability shall cease as soon as the goods leave the ship's deck and/or tackle".

The words in that clause are very clear and adequate for the purpose and it must be held to be operative and effectual to protect the first defendants. (See *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd.*[1]). In that case the exemption clause reads (*inter alia*),

"in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle."

The goods were discharged at Penang and stored in a shed on the jetty and they were stolen by a servant of the landing agents. It was held that the fraudulent misappropriation by the servant of the landing agents was not treated as the fraudulent act of the shipping company, who were thereby protected by the exemption clause from any liability whatsoever.

Next I must consider the question whether the act which caused the short delivery was a fundamental breach In the category of cases exemplified by *Bontex Knitting Works Ltd.* v. *St. John's Garage,*[2] *Alexander* v. *Railway Executive,*[3] *Karsales (Harrow) Ltd.* v. *Wallis*[4] and *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.*[5] Lord Denning in the latter case said (page 202):

"There will be found in each case a breach which evinces a deliberate disregard of his bounden obligations. Thus in *Bontex Knitting Works* case, the lorry driver left the lorry unattended for an hour in breach of an express agreement for immediate delivery. In *Alexander's* case, the cloak room official allowed an unauthorised person to have access to the goods in breach of the regulations in that behalf. In *Karsales* case, the agent of the finance company delivered a car which could not go at all, in breach of its obligation to deliver one that could go. In each of these cases it could reasonably be inferred that the servant or agent deliberately disregarded one of the prime obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf; and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent."

In *Sze Hai Tong Bank's* case, the shipping agents released the goods against a banker's indemnity when they knew fully well that they ought not to do so except against the appropriate bills of lading.

Thus, where the servant or agent had deliberately flouted one of the bounden obligations of the contract, then that act is referable to the principal's act; in such circumstances, the principal cannot take refuge under an exemption clause. In the present case the loss or short delivery was caused by theft by some person or persons unknown. I would not consider the fraudulent act of such person or persons to be the act of the principal, the first defendants. In my view this case comes within the ambit of cases exemplified by *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd., supra, Ashby* v. *Tolhurst,*[6] and *Hollins* v. *J. Davy Ltd.*[7]

I therefore hold that the first defendants have established that there has been both a loss by theft and cesser of liability covered by the two exemption clauses.

The Port Swettenham Authority, the second defendants in this case, deny all liability. They say they are protected by Rule 91(1) of the Port Authority By-laws, 1965 (L.N. 127/1965) which reads:

"The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless such loss, or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants."

This places the onus on them to show some circumstance which negatives the idea of misconduct or negligence on their part. (See *Sharikat Lee Heng Sdn. Bhd.* v. *Port Swettenham Authority*[8]). Negligence means nothing more than the doing of some act which a person of ordinary prudence would not do under the circumstances or the omission to do some act which a man of ordinary prudence would do under the circumstances. The test is that of a man of ordinary prudence would take of his own goods in similar circumstances (see section 104 of the Contracts (Malay States) Ordinance, 1950).

In essence the second defendants are bound to exercise as much care and diligence in keeping and preserving the goods entrusted to them on behalf of the plaintiffs as a custodian for reward would do under similar circumstances. That is all they are required to do. They are not supposed to do the impossible. If the goods are stolen by their servants, in the absence of negligence on their part, they cannot be held liable. In the absence of personal negligence on the part of the employer *e.g.*, negligence in selecting the servant whose act had occasioned the loss, (see *Williams* v. *Curson Syndicate Ltd.*[9]) the latter is not responsible for the fraudulent act of the servant, as the loss of the goods is not referable to the employer's negligence, and as the loss is caused by an act which is not within the scope of the servant's employment. (See *Cheshire* v. *Bailey*[10]).

Now the facts. Evidence was adduced to the effect that goods were unloaded on the instructions of the shipping agents on to pallets at the ship's side. From there they were conveyed by forklifts operated by employees of the second defendants. They had to pass through a door of the godown and under the direction of the clerk-in-charge of the said godown the goods were stored. No record was kept by the second defendants. Instead outturn statements were issued. The godown, which was about 40 feet from the ship, was like any other jetty godown; it was made of corrugated iron sheets over a brick 4 ft. wall from ground level. There were strategic doors manned by the second defendants' servants for the purpose of receiving and delivering goods at specific times. Four checks were made at all times — on forklifts, on delivery lorries, at delivery platform and at the entrance gate. Uniformed policemen guarded the area round the clock; plain clothes detectives were also employed. There had been a few attempts of theft but in most cases they were nipped in the bud. In 1967 a Study Committee was appointed to streamline the administration of the Port and as a result the second defendants abolished wharf tallying at the relevant period.

On the whole I find as a fact that the second defendants had exercised due care and diligence in keeping and preserving the goods entrusted to them as any prudent custodian for reward would do under the circumstances. That was all they were required to do in law and that was done. It would be enhancing the burden of proof upon the second defendants to an absurd extent if they had to prove beyond and above that required of them under section 104 of the Contract (Malay States) Ordinance.

I am satisfied that they have discharged the onus that the loss of the goods in question is not due solely to their misconduct or negligence. The plaintiffs' case is dismissed with costs.

Claim dismissed.

Solicitors: *Shearn, Delamore & Co.; Aljeffri & Co.; Skrine & Co., Tengku Zuhri, Manan & Abdullah.*

B. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[App. Civil Juris (Chang Min Tat J.) December 28, 1972]
[Ipoh Originating Motion No. 40 of 1969]

Income Tax — Joint Hindu Family — Personal law of Hindus in Malaysia — Case Stated from Special Commissioners — Findings of fact — Whether provision as to Hindu Joint Family contrary to Constitution — Income Tax Act 1967, s. 72 — Federal Constitution, Articles 4 and 8.

This was an appeal by way of case stated from the decisions of the Special Commissioners. The Comptroller-General had assessed income tax on the basis of a Hindu joint family and the Special Commissioners had confirmed the assessments. It was argued on behalf of the appellant —

(a) that section 72 of the Income Tax Act, 1967, which deals with Hindu Joint Families does not apply to Hindus whose domicile is Malaya and can only apply to Hindus who are domiciled in India.

(b) if section 72 is held to apply to the appellant it is in violation of Article 8 of the Constitution of Malaysia and therefore void.

Held, dismissing the appeal: (1) where a Hindu has shown the deliberate preservation of his personal law, as here in the case of joint families, he is bound by such personal law, despite the fact that he has now emigrated to another country and has acquired a domicile of choice in the country of his origin;

(2) section 72 of the Income Tax Act, 1967 merely re-enacts what is the personal law by deliberate election of citizens of Hindu custom and religion;

(3) the Special Commissioners were correct in their findings of fact and the inferences they drew from such findings.

Cases referred to:-

(1) *British Insulated and Helsby Cables* v. *Atherton* [1926] A.C. 205 at p. 213.

(2) *Dorothy Yee Yeng Nam* v. *Lee Fah Kooi* [1956] M.L.J. 257 at p. 263.

(3) *Re Craignish* [1892] 2 Ch. 180.

(4) *Douglas* v. *Douglas* (1871) L.R. 12 Eq. 617.

(5) *Meyappa Chettiar* v. *F.M.S.* [1941] M.L.J. 132.

(6) *Somdara Achi* v. *Kalyani Achi* [1953] M.L.J. 147.

ORIGINATING MOTION.

M. Sivalingam for the appellant.